Supreme Court, U.S.
FILED

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NO. _____

In The

Supreme Court of the United States

SEETA PERSAUD,
Petitioner,

v.

ATTORNEY GENERAL
OF THE UNITED STATES,
DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a removal order is invalid *ab initio* when an Immigration Judge orders an alien removed *in absentia*, even though the immigration service failed to properly serve the alien with the Notice to Appear, even though the immigration service failed to inform the alien of her duty to maintain her address current with the immigration service, and even though the record reflects that the alien did not receive the Notice to Appear.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all the parties to the proceedings in the United States Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....1

STATUTES & REGULATIONS INVOLVED...2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....5

CONCLUSION.....11

APPENDIX A.....12

July 9, 2009 Order of the Court of Appeals for the Second Circuit denying the Petitioner's Petition for Review.

APPENDIX B.....16

January 29, 2009 Order of the Board of Immigration Appeals t denying the Petitioner's Motion to Reopen.

APPENDIX C.....19

February 8, 2010 Order of the Court of Appeals for the Second Circuit denying the Petitioner's Motion to Reconsider the denial of her Petition for Review.

APPENDIX D.....21

8 U.S.C. § 1229.

APPENDIX E.....27

8 U.S.C. § 1229a.

TABLE OF AUTHORITIES

CASES

Matter of G-Y-R-, 23 I. & N. Dec. 181 (BIA 2001).....3, 6-11

Salta v. I.N.S., 314 F.3d 1076 (9th Cir. 2002).....10

Urbina-Osejo v. I.N.S., 124 F.3d 1314 (9th Cir. 1997).....7

STATUTES & REGULATIONS

8 U.S.C. § 1229.....3, 8, 11

8 U.S.C. § 1229a.....2

OPINIONS BELOW

The July 9, 2009 opinion of the Court of Appeals for the Second Circuit, Docket Number 09-0661-ag, for which a Motion to Reconsider was denied on February 8, 2010, and whose judgment is herein sought to be reviewed, is not published in a reporter, and is reprinted in the separate Appendix to this Petition, pp. 12-18, 19-20. The prior opinion of the United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, entered on January 29, 2009, Case Number A: 075-930-128, is not published in a reporter, and is reprinted in the separate Appendix to this Petition, pp. 16-18.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 2009, and the Court of Appeals denied the Petitioner's Motion to Reconsider on February 8, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES & REGULATIONS INVOLVED

This case involves provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1229(a) and 1229a(b).

STATEMENT OF THE CASE

The Petitioner, Mrs. Persaud, is a citizen of Guyana. Mrs. Persaud's husband, Swaresh Persaud, and children are United States citizens, she has been in the United States continuously for twenty years, she has never been arrested or convicted for any crimes whatsoever, and she has no family or property left in Guyana.

The Department of Homeland Security (DHS) is in the imminent process of deporting Mrs. Persaud from the United States, based on a removal[1] order issued against her, by the Department of Justice's Executive Office for Immigration Review (EOIR), in 2002. However, Mrs. Persaud contends that said removal order must be declared null and void,

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[1] In immigration law terms, "removal" basically means deportation, and is not to be confused with the removal more common in federal courts pertaining to transferring cases between state and federal courts. The term removal and deportation can generally be used interchangeably.

and that her removal proceedings are defective *ab initio*, because she never received a Notice to Appear[2] from the DHS.

Mrs. Persaud came to the United States some twenty years ago. She entered the United States lawfully, but overstayed her authorized period of stay. In 1998, Mrs. Persaud married Edwin Guzman in New York. Mr. Guzman is a U.S. citizen, and he filed a petition with the DHS to obtain lawful permanent status for Mrs. Persaud, which the DHS denied. Mrs. Persaud divorced Mr. Guzman on September 3, 2002. The DHS claims that it issued a Notice to Appear (deportation charges) against Mrs. Persaud on April 26, 2002, and that it mailed the Notice to Appear (NTA) to Mrs. Persaud, by regular mail, to: 426 3rd St., Elmont, NY 11003.

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[2] A Notice to Appear, in the immigration law context, is akin to a charging document, and is the document that contains the charges against an alien the Government contends is removable from the United States, and is also the document that commences and dockets removal proceedings in Immigration Court. In order for those proceedings to be valid, the alien charged must receive a Notice to Appear, and an Immigration Judge cannot enter an order of removal if the alien has not been given a Notice to Appear. *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001), *see* 8 U.S.C. § 1229(a)(1). A Notice to Appear must not be confused with a Notice of Hearing, which merely states the time and place at which an Alien must appear for a hearing before an Immigration Judge.

However, Mrs. Persaud had moved from that address some forty-three days before the DHS allegedly issued and mailed the NTA.

Mrs. Persaud never received the NTA, was not present at her initial removal hearing, and the Immigration Judge in New York ordered her removed from the United States, *in absentia*, on October 11, 2002. Mrs. Persaud initially and timely sought relief from the Immigration Judge, and then from the Board of Immigration Appeals (Board), but all of her appeals and motions were denied. Mrs. Persaud has always maintained that she never received an NTA for her removal proceedings.

Mrs. Persaud was eligible for Cancellation of Removal in 2002, which would have likely led to the Immigration Court adjusting her status to that of a lawful permanent resident of the United States. Mrs. Persaud is also the beneficiary of an approved I-130 Petition for Alien Relative, filed by her current husband, Mr. Persaud, which the DHS approved on August 8, 2007. Said approved I-130 also affords Mrs. Persaud with the ability to become a lawful permanent resident of the United States as the immediate relative of a U.S. citizen.

Since 2003, Mrs. Persaud has filed both appeals and motions to reopen with the EOIR,

which have all been denied, prompting her to file a Petition for Review with the Court of Appeals for the Second Circuit, which denied the same on July 9, 2009, and further denied Mrs. Persaud's Motion to Reconsider on February 8, 2010. The instant Petition for Writ of Certiorari stems from the final denial issued by Court of Appeals for the Second Circuit on February 8, 2010.

REASONS FOR GRANTING THE WRIT

This case presents an exceptionally important question of federal law that has not been, but should be settled, by this Court, and on which the circuits have been generally silent: whether an Immigration Judge's deportation order is valid when the record shows that the alien did not receive the charging document (NTA). The resolution of this issue is crucial to all aliens placed in removal proceedings because their due process and statutory safeguards will continue to be grossly and arbitrarily violated unless the Court issues a mandate protecting those safeguards.

Therefore, Mrs. Persaud, the Petitioner, respectfully submits that the Immigration Judge's *in absentia* order is invalid because

Mrs. Persaud never received the Notice to Appear (NTA). An in absentia order may only be entered where the alien has received, or can be charged with receiving, a Notice to Appear (Form I-862) informing the alien of the statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address, pursuant to section 239(a)(1)(F) of the Immigration and Nationality Act. *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001). The entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the Notice to Appear that was served by certified mail at an address obtained from documents filed with the Immigration and Naturalization Service several years earlier. *Id.*

On April 26, 2002, the Department of Homeland Security (DHS) allegedly mailed an NTA to Mrs. Persaud to the address the DHS had on record for Mrs. Persaud. The last correspondence Mrs. Persaud had received from the DHS was a letter denying Mr. Guzman's petition for Mrs. Persaud. That letter did not state that Mrs. Persaud had to keep the DHS

abreast of any address changes she might make. *Id.*[3]

The DHS allegedly mailed the NTA to Mrs. Persaud on April 26, 2002, to 426 3rd Street, Elmont, New York 11003. However, Mrs. Persaud had moved from the Elmont address forty-three days before the DHS allegedly mailed her the NTA. Accordingly, given that she was no longer at that address, and given the fact that she has sworn, under oath, that she never received the NTA,[4] the entry of the *in absentia* order of removal was inappropriate because Mrs. Persaud did not receive, and cannot be charged with receiving, the Notice to Appear. *G-Y-R*, 23 I. & N. at 181.

The Board of Immigration Appeals ignored its own precedent because *Matter of G-Y-R* should have prompted the reopening of

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[3] The Court of Appeals could have ordered the Respondents to reopen this case on this single fact alone, because in *Urbina-Osejo v I.N.S.*, 124 F.3d 1314 (9th Cir. 1997), the 9th Circuit held that a remand is required in deportation proceeding in which the alien failed to appear to determine whether the alien was notified of the requirement that she notify the Immigration and Naturalization Service of any changes in address.

[4] Mrs. Persaud has stated that she was aware that she had to attend a hearing on October 11, 2002, but that is irrelevant to the matter at hand because *Matter of G-Y-R* deals with improper or defective service of a Notice to Appear, as was the case here, not of a Notice of Hearing, which is a completely different administrative form and document than a Notice to Appear.

Mrs. Persaud's removal proceedings. Just like in *G-Y-R*, the NTA never reached Mrs. Persaud, and the address change requirement advisals found in the NTA were never conveyed to Mrs. Persaud. The Respondents may claim that Mrs. Persaud was aware of her address obligations, and therefore prompted the defective notice of proceedings when she failed to keep her address information current. However, *G-Y-R* stands for proposition that an alien's current address, under 8 U.S.C. § 1229, is an address where an alien can be "contacted respecting proceedings under section 240." *G-Y-R*, 23 I&N at 188.

In that vein, the NTA deals with the alien's "particular address obligations regarding removal proceedings." *Id.* And unless the alien is chargeable with having received the NTA, and any notice of hearing contained therein, the alien "has not been placed on notice of proceedings or on notice of the date, time, and location of the removal hearing." *Id.* at 189.

In the case at hand, Mrs. Persaud never received the NTA, she was not even living at the address to which the DHS allegedly mailed the NTA, and Mrs. Persaud was therefore not properly noticed as to the charges brought against her, or of her duty to keep the DHS or the Immigration Court abreast of any changes

in her address. Simply because the DHS allegedly mailed the NTA to Mrs. Persaud's last known address, as far as DHS records were concerned, does not satisfy the notice requirements of the Act because the Board held in *G-Y-R* that:

> Simply mailing the Notice to Appear to an address authorized under section 239(a)(1) does not automatically convert the alien's last known address into a section 239(a)(1)(F) address. While the statute may permit the regular mailing of the Notice to Appear to the last known address, the "(a)(1)" address so to speak, *the statute does not authorize the entry of an in absentia order unless the advisals in the Notice to Appear are properly conveyed*, at which time the address will have become an "(a)(1)(F)" address. In short, the notice requirement leading to an *in absentia order* cannot be satisfied by mailing the Notice to Appear to the last known address of the alien when the alien does not receive the mailing. Again, the "last address" or the "most recent address" provided by the alien "in accordance with" or "under"

> subsection (a)(1)(F) must be an address *consequent to the alien's being put on notice of the particular address obligations contained in the Notice to Appear.*

G-Y-R, 23 I&N at 189 (emphasis added).

In the instant case, the Notice to Appear was mailed, via regular mail,[5] to an old address the DHS had for Mrs. Persaud, and that Mrs. Persaud had provided before she was placed in removal proceedings, before she was apprised of the particular address obligations pertaining to removal proceedings, before she was advised of the charges against her, and before she was advised of the *in absentia* consequences of failing to keep her address information current for removal hearing purposes. As the record reflects that the NTA never reached Mrs. Persaud, it is a logical presumption that Mrs. Persaud never received the advisals contained in the NTA.

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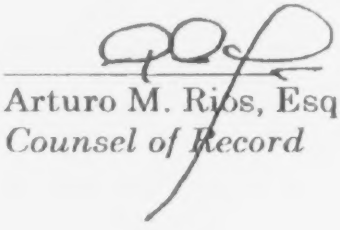
[5] The DHS may argue that, assuming it did mail the NTA to Mrs. Persaud via regular mail, that mode of notice is sufficient. However, and again, assuming that the DHS did mail the NTA, said mode of service does not present as strong a presumption of notice as would personal service or service via certified mail. *Salta v. I.N.S.*, 314 F 3d 1076 (9th Cir. 2002) (where service of notice is attempted by regular as opposed to certified mail, the same strong presumption of delivery does not arise, and less is required to rebut this weaker presumption).

For those reasons, and as per *G-Y-R*, the Immigration Judge could not enter an order of removal for Mrs. Persaud when, as in this case, the DHS allegedly mailed the NTA to the last address it had on file for Mrs. Persaud, but the record reflects that Mrs. Persaud did not receive the Notice to Appear, and was therefore never notified of the initiation of removal proceedings or of her address obligations under 8 U.S.C. § 1229(a)(1). Given those facts, the Immigration Judge could not have proceeded *in absentia*, making Mrs. Persaud's October 11, 2002 *in absentia* removal order null and void, and defective *ab initio*, which had to compel the Court of Appeals to order the Respondents to reopen Mrs. Persaud's removal proceedings.

CONCLUSION

For the foregoing reasons, Mrs. Persaud, the Petitioner, respectfully prays that this Honorable Court will grant her Petition for a Writ of Certiorari.

RESPECTFULLY submitted this 5th day of May, 2010.



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APPENDIX A

United States Court of Appeals
For The
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of July, two thousand nine,

Present:

Guido Calabresi,
Peter W. Hall,
Circuit Judges,
William K. Sessions, III,
District Judge.

Seal of the Court

Seeta Persaud,
Petitioner,

v. 09-0661-ag

Attorney General of the
United States, Department
of Homeland Security,

Respondents.

Petitioner, presently detained in Pompano Beach, Florida, filed a petition for review of a January 2009 decision of the Board of Immigration Appeals ("BIA") denying her motion to reopen. She has now filed a motion for writ of habeas corpus, alleging, as she does in her petition for review, that her removal proceedings were "defective ab initio," and that her 2002 removal order is constitutionally defective, because, inter alia, "the Department of Homeland Security never properly served her with a Notice of Appeal." Petitioner further seeks a stay of removal pending this Court`s ruling on her petition for review. Respondents oppose Petitioner`s motion and her request for a stay of removal, and further seek permission to file a response exceeding the 20-page limit of Federal Rule of Appellate Procedure 27.

Upon due consideration, it is hereby ORDERED that the Respondent`s motion to file a response in excess of the Rule 27 20-page limit is GRANTED. However, Petitioner`s motion for writ of habeas corpus is DENIED and her petition for review is DISMISSED. First, we find that we have authority to rule on the merits of Petitioner`s motion under *Elkimya v. Dep`t of Homeland Security*,

484 F.3d 151 (2d Cir. 2007), and reject the Respondent`s arguments to the contrary. However, we also find that Petitioner`s motion raises no "substantial claims" in support of her release, nor do "Extraordinary circumstances exist that make the grant of [habeas relief] necessary to make the [petition for review] remedy effective." *Id* at 154. The BIA did not abuse its discretion in determining that Petitioner's motion to reopen was untimely, nor does she present a credible basis on which the time to file her motion should be equitably tolled. As to Petitioner`s allegation that she "never received [a Notice to Appear] for her removal proceedings," Petitioner did not raise it to the IJ in her first motion to reopen, nor did she raise it to the BIA in her second motion to reopen. Accordingly, the BIA`s rejection of Persaud`s motion cannot be deemed an abuse of discretion, nor is there a reasonable basis on which this Court could conclude that Persaud`s removal proceedings, or the removal order, were constitutionally defective. *See Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006). For these reasons, both the motion for habeas corpus relief and the petition for review are meritless. Finally, the motion for a stay of removal is DENIED as moot.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: *s/ Franklin Perez*

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: Jan 29 2009

File: A075 930 128 – New York, NY

In Re: SEETA GUZMAN a.k.a. Seeta Persaud

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Arturo Rios, Esq.

ON BEHALF OF DHS: Dara Faith Reid
Assistant Chief Counsel

ORDER:

The motion is untimely and will be denied. On October 11, 2002, the Immigration Judge issued an *in absentia* order of removal in

this proceeding. On January 14, 2004, the respondent filed a motion to reopen. In an affidavit attached to her motion, she averred that "I and my daughter, Aruna Persaud, were scheduled to appear at Immigration Court on October 11, 2002, but could not appear due to a medical condition which confined me to bed." Motion to Reopen, Affidavit, p. 2, para. 8. On February 2, 2004, the Immigration Judge denied reopening, finding that, *inter alia*, the motion was untimely. The respondent filed a timely Notice of Appeal. On April 14, 2005, the Board dismissed the respondent's appeal. On June 5, 2008, the Board denied the respondent's first motion to reopen. On December 10, 2008, the respondent filed the instant motion. The respondent's motion is untimely, as well as number-barred, and she has not demonstrated that an exception to the statutory and regulatory timely filing requirements applies. *See* section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(2) and (3); 8 C.F.R. 1003.23(b)(4)(ii).

To the extent the respondent seeks *sua sponte* reopening, we decline to exercise our discretionary *sua sponte* authority as she has not demonstrated a fundamental change in law or exceptional circumstances. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999)(fundamental change in law may

warrant *sua sponte* reopening notwithstanding otherwise applicable time and number limitations on motions); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)("the power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). The respondent's arguments regarding her *in absentia* order of removal have been previously raised and rejected. The fact that she may now be eligible for another type of relief from removal is not an exceptional circumstance justifying the exercise of our *sua sponte* authority. Accordingly, the motion is denied. The request for a stay us denied as moot.

s/ illegible

FOR THE BOARD

APPENDIX C

United States Court of Appeals
For The
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of February, two thousand ten,

Present:

Guido Calabresi,
Peter W. Hall,
Circuit Judges,
William K. Sessions, III,
District Judge.

Seal of the Court

Seeta Persaud,
Petitioner,

v. 09-0661-ag

Attorney General of the
United States, Department
of Homeland Security,

Respondents.

IT IS HEREBY ORDERED that the motion by Petitioner for reconsideration of the order dismissing the petition for review is DENIED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: *s/ Catherine O'Hagan Wolfe*
Seal of the Court

Judy Pisnanont, Motions Staff Attorney

APPENDIX D

8 U.S.C. § 1229

United States Code
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos) Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

§ 1229. Initiation of removal proceedings

(a) Notice to appear
(1) In general
In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.
(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.
(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under

exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general
In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--
(i) the new time or place of the proceedings, and
(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception
In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files
The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel
(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel
The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction
Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of

section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

APPENDIX E

8 U.S.C. § 1229a

United States Code
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general
An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges
An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures
Unless otherwise specified in this chapter, a proceeding under this section shall be the sole

and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding
(1) Authority of immigration judge
The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding
(A) In general
The proceeding may take place--
(i) in person,
(ii) where agreed to by the parties, in the absence of the alien,
(iii) through video conference, or
(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien
If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding
In proceedings under this section, under regulations of the Attorney General--
(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear
(A) In general
Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order
Such an order may be rescinded only--

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior
The Attorney General shall, by regulation--

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.
Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof
(1) Decision
(A) In general
At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions
If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the

alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien
In the proceeding the alien has the burden of establishing--

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.
In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general
In the proceeding the Service has the burden of establishing by clear and convincing evidence

that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of

law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records
In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is--

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the

State's record repository or the court's record repository.
A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general
An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers

to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements,

without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice
If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider
(A) In general
The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general
An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline
(i) In general
Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum
There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections [FN1] 1158 or

1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear
The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents
Any limitation under this section on the deadlines for filing such motions shall not apply--
(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,, [FN2] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);
(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and
(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title [FN3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal
The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions
In this section and section 1229b of this title:
(1) Exceptional circumstances
The term "exceptional circumstances" refers to exceptional circumstances (such as battery or

extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means--

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.